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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

JEFFREY W. BERGER, TAMI M. BERGER,)
WIBAUX 1, LLC, and PRO-FRAC)
HEATING & TRUCKING, LLC,)

Plaintiffs,)

-vs-)

BANK OF COLORADO, a Colorado)
Corporation,)

Defendant.)

Cause No. DV 17-0945

RUSSELL C. FAGG

COMPLAINT AND
DEMAND FOR JURY TRIAL

120/139561

COME NOW plaintiffs Jeffrey W. Berger, Tami M. Berger, Wibaux 1, LLC, and Pro-Frac Heating & Trucking, LLC and for their claims for relief against the defendant Bank of Colorado allege as follows:

EXHIBIT

tabbies

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1 1. Jeffrey and Tami Berger are married and reside in both Yellowstone County,
2 Montana and Williams County, North Dakota.

3 2. Wibaux 1, LLC is a Montana limited liability company that conducts farming
4 and ranching operations in Montana, North Dakota, and South Dakota. The Bergers are the
5 sole members of Wibaux 1, LLC.

6 3. Pro-Frac Heating & Trucking, LLC is a single member, North Dakota limited
7 liability company that does business in North Dakota. Jeffrey Berger is the sole member of
8 Pro-Frac.

9 4. The Bank of Colorado is a Colorado corporation that conducts banking
10 business in Montana, North Dakota, and South Dakota.

11 5. Beginning in 2013, the Bergers began using the Bank of Colorado to finance
12 the purchase of agricultural land in Montana, North Dakota, and South Dakota for farming
13 and ranching. Previously, the Bergers had used the Bank of Colorado to purchase a residence
14 in Estes Park, Colorado and a commercial lot in Estes Park, Colorado. A special relationship
15 existed between the Bergers and the Bank in which the Bergers had trust and confidence in
16 the Bank and relied upon its advice and guidance in purchasing agricultural land and cattle.

17 6. Based upon advice and encouragement from Bank of Colorado officials, the
18 Bergers purchased five agricultural properties in Montana and one agricultural property
19 located in both North Dakota and South Dakota between March 2013 and May 2015. In
20 general, the Bank of Colorado financed about 50% of the purchase prices for these properties
21 and the Bergers used their own funds for the balance of the purchase prices. These properties

1 were purchased by Wibaux 1, LLC.

2 7. In December 2013, the Bank of Colorado also loaned Wibaux 1, LLC
3 \$7,536,325 to purchase cattle for the Wibaux County, Montana ranches that Wibaux 1 had
4 purchased in March and August of 2013. The maturity date for this Chattel Loan was January
5 1, 2019.

6 8. In the summer of 2015, the Bergers asked the Bank of Colorado whether it
7 would be possible to consolidate their six real estate loans to make it easier for them to make
8 and keep track of their loan payments. The Bank of Colorado agreed to do so.

9 9. In September 2015, the Bank of Colorado proposed a \$19,500,000 loan to
10 refinance the six real estate loans. The terms proposed by the Bank of Colorado were
11 unfavorable to Wibaux 1, LLC because, among other reasons: (a) some of the maturity dates
12 for the real estate loans were significantly shortened; (b) the Chattel Loan's maturity date was
13 shortened from January 1, 2019 to February 1, 2016 and required a lump sum payoff as a
14 condition for refinancing the six real estate loans; (c) the Bank of Colorado required a new
15 loan of \$4,500,000, the Line of Credit Loan, which had a maturity date of February 26, 2016;
16 and (d) any default under the Chattel Loan or the Line of Credit Loan would trigger a default
17 of the new Consolidated Real Estate Loan. The Bank's proposed \$19,500,000 loan was also
18 unfavorable to the Bergers and Pro-Frac because it required their personal guarantees on all
19 three loans.

20 10. In discussing its proposal with the Bergers, the Bank of Colorado represented
21 that the short deadlines were because the Bank had not been able to complete all of the

1 paperwork necessary to finalize the maturity dates. The Bank also represented that it would
2 extend the maturity dates of the Chattel Loan and the Line of Credit Loan as long as the
3 Bergers continued to make loan payments in roughly the same amounts as they had in the
4 past. The Bank also represented that while its refinancing proposal was necessary to comply
5 with the Bank's lending guidelines, the proposal was a formality that could and would be
6 modified to enable the Bergers to make loan payments that were similar to those loan
7 payments they had been making.

8 11. Based upon the Bank of Colorado's representations and assurances, Wibaux 1,
9 LLC and the Bergers executed the \$19,500,000 Consolidated Real Estate Loan agreement,
10 Loan #2910005994, on November 25, 2015; executed a modification to the Chattel Loan,
11 Loan #900914115, on October 2, 2015; and executed the Line of Credit Loan, Loan
12 #2910005995, on October 2, 2015.

13 12. In March of 2016, the Bank of Colorado extended the maturity dates of the
14 Chattel Loan and the Line of Credit loan to May 1, 2016. In August of 2016, the Bank of
15 Colorado extended the maturity dates of the Chattel Loan and the Line of Credit Loan to
16 October 1, 2016.

17 13. Despite its previous representations and assurances, the Bank of Colorado
18 refused to extend the October 1, 2016 maturity dates for the Chattel Loan and Line of Credit
19 even though Wibaux 1, LLC had substantially performed its obligations under those
20 agreements and was not in default. On October 14, 2016, the Bank of Colorado declared that
21 Wibaux 1, LLC was in default of the Chattel Loan, Line of Credit loan, and Consolidated

1 Real Estate Loan because the Chattel Loan and Line of Credit loan were not fully repaid by
2 October 1, 2016.

3 14. On November 18, 2016, the Bergers received a banker's box full of documents
4 from the Bank of Colorado which contained a Forbearance Agreement. In its Forbearance
5 Agreement, the Bank of Colorado offered to delay foreclosure proceedings if the Bergers
6 would consent to onerous terms for the repayment of the three loans. The Bergers retained
7 counsel to try to negotiate more reasonable terms with the Bank of Colorado. In response, the
8 Bank of Colorado made the terms of the Forbearance Agreement even more onerous.

9 15. To prevent imminent foreclosure, to preserve the market value the ranches
10 already listed for sale, and to prevent the disruption to its farming and ranching operations, the
11 Bergers were forced to sign the Forbearance Agreement and related documents even though
12 its terms were unconscionable, assessed unlawful liquidated damages, and constituted a
13 contract of adhesion. The Forbearance Agreement was presented to the Bergers by the Bank
14 of Colorado's counsel in Billings, Montana and was signed in Billings, Montana.

15 16. Despite being compelled by the terms of the Forbearance Agreement to sell
16 most of their cattle at unfavorable prices and at the wrong time for tax purposes, the Bergers
17 have continued to make substantial loan payments to the Bank of Colorado and would not be
18 in default if the Bank of Colorado had agreed to extend the maturity dates for the Chattel
19 Loan and the Line of Credit loan as the Bank represented it would do and had done until
20 October 1, 2016.

21 17. Wibaux 1, LLC, the Bergers, and Pro-Frac have been unable to meet the

1 onerous and unconscionable terms of the Forbearance Agreement despite their good faith
2 efforts to do so. The Bank of Colorado is unwilling to negotiate any reasonable modifications
3 to the Forbearance Agreement.

4 18. The Bank intends to commence foreclosure proceedings under the Forbearance
5 Agreement that will cause the plaintiffs to suffer substantial damages and irreparable harm
6 beyond those damages that the plaintiffs have already incurred because of the Bank of
7 Colorado's wrongful conduct.

8 **FIRST CLAIM FOR RELIEF – NEGLIGENT MISREPRESENTATION**

9 19. The allegations set forth in paragraphs 1 through 18 above are incorporated by
10 reference herein.

11 20. The Bank of Colorado negligently misrepresented to the plaintiffs that it would
12 extend the maturity dates of the Chattel Loan and Line of Credit Loan when the Bank
13 presented the terms of the \$19,500,000 Consolidated Real Estate Loan. The plaintiffs
14 justifiably relied upon those misrepresentations which were designed to induce the plaintiffs
15 to accept the Bank's proposed terms. The Bank's negligent misrepresentations have caused
16 the plaintiffs to suffer substantial damages which they are entitled to recover under Montana
17 law.

18 **SECOND CLAIM FOR RELIEF – BREACH OF FIDUCIARY DUTY**

19 21. The allegations set forth in paragraphs 1 through 20 above are incorporated by
20 reference herein.

21 22. The plaintiffs and the Bank developed a special relationship in which the Bank

1 rendered advice to the Bergers about purchasing farm and ranch properties, advised them
2 about cattle purchases, and advised them about financing. The Bank owed the Bergers a
3 fiduciary duty to act in their best interests. The Bank breached the fiduciary duty it owed to
4 the plaintiffs and caused them to suffer substantial damages which they are entitled to recover
5 under Montana law.

6 **THIRD CLAIM FOR RELIEF – FRAUD AND UNDUE INFLUENCE**

7 23. The allegations set forth in paragraphs 1 through 22 above are incorporated by
8 reference herein.

9 24. The Bank's representations that it would continue the maturity dates of the
10 Chattel Loan and the Line of Credit Loan as set forth above were false; the Bank either knew
11 those representations were false or did not know if the representations were true; the plaintiffs
12 reasonably and justifiably relied upon the Bank's false representations; the Bank's
13 misrepresentations were material and designed to induce the plaintiffs to rely upon those
14 misrepresentations in entering into the Consolidated Real Estate Loan, the Chattel Loan, and
15 the Line of Credit Loan; the plaintiffs did not know the Bank's representations were false; and
16 the plaintiffs have suffered substantial damages caused by the Bank's misrepresentations.

17 25. In addition to recovering damages, the plaintiffs are entitled to rescind the
18 Forbearance Agreement pursuant to M.C.A. § 28-2-1711 because of the Bank's fraud and
19 undue influence and because the Forbearance Agreement was obtained through duress.

20 26. Due to the Bank's fraud, the plaintiffs are also entitled, pursuant to M.C.A. §
21 28-2-1611, to have the Chattel Loan, Line of Credit Loan, and Consolidated Real Estate Loan

1 revised to establish their intended maturity dates and the intended application of loan
2 payments.

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4 **FOURTH CLAIM FOR RELIEF –
BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING**

5 27. The allegations set forth in paragraphs 1 through 26 above are incorporated by
6 reference herein.

7 28. The Bank breached the duty of good faith and fair dealing it owed to the
8 plaintiffs by failing to extend the maturity dates for the Chattel Loan and the Line of Credit
9 Loan, thereby causing the plaintiffs to suffer damages to which they are entitled to recover
10 under Montana law.

11 **FIFTH CLAIM FOR RELIEF -
12 CONTRACTIVE ADHESION, UNLAWFUL LIQUIDATED DAMAGES, AND
UNCONSCIONABLE TERMS**

13 29. The allegations set forth in paragraphs 1 through 28 above are incorporated by
14 reference herein.

15 30. The Forbearance Agreement is unenforceable because its terms provide for
16 unlawful liquidated damages, its terms are unconscionable, and the Forbearance Agreement is
17 an impermissible contract of adhesion.

18 **SIXTH CLAIM FOR RELIEF – PUNITIVE DAMAGES**

19 31. The allegations set forth in paragraphs 1 through 30 above are incorporated by
20 reference herein.

21 32. The Bank of Colorado acted with actual malice or actual fraud in committing

1 the wrongful conduct set forth in the First, Second, and Fourth Claims for Relief, thereby
2 entitling the plaintiffs to recover punitive damages pursuant to M.C.A. § 27-1-221.

3 WHEREFORE, having set forth their claims for relief, the plaintiffs pray:

4 1. That judgment be entered for the plaintiffs and against defendant Bank of
5 Colorado on all claims for relief set forth herein;

6 2. That judgment be entered for the plaintiffs and against defendant Bank of
7 Colorado for all compensatory and punitive damages the plaintiffs are entitled to recover
8 under Montana law;

9 3. For the plaintiffs' attorney's fees and costs incurred herein; and

10 4. For such other relief as this Court deems just and proper.

11 **DEMAND FOR JURY TRIAL**

12 Plaintiffs request a trial by jury on all triable issues.

13 DATED this 10th day of July, 2017.

14 HARRIS, GANNETT & VARELA, PLLC

15
16 By 

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